

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

REGAL STONE LIMITED and FLEET	)	Case No. 08-5098 SC
MANAGEMENT, LTD.,)	
	)	Related cases:
Plaintiffs,	)	07-5800 SC
	)	07-6045 SC
v.	)	08-2052 SC
	)	08-2268 SC
JOHN J. COTA, an individual, THE	)	08-5096 SC
SAN FRANCISCO BAR PILOT'S	)	09-1469 SC
ASSOCIATION, an unincorporated)	
association, PETER McISAAC, an	)	ORDER GRANTING MOTION
individual, and RUSSELL NYBORG, an	)	<u>TO DISMISS</u>
individual,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

On January 19, 2010, Defendants Captain Peter McIsaac ("McIsaac") and Captain Russell Nyborg ("Nyborg")(collectively, "Moving Defendants") filed a Motion to Dismiss. ECF No. 45 ("Mot."). The Motion includes a request for attorney fees. Id. at 6. Plaintiffs Regal Stone Limited ("Regal Stone") and Fleet Management, Ltd., ("Fleet") (collectively, "Plaintiffs") filed an Opposition, and the Moving Defendants submitted a Reply. ECF Nos. 50 ("Opp'n"), 52 ("Reply"). Pursuant to Civil Local Rule 7-1(b), the Court decides the Motion without oral argument. For the following reasons, the Motion to Dismiss is GRANTED, and the request for attorney fees is DENIED.

1 **II. BACKGROUND**

2 This action stems from the allision¹ of the cargo ship M/V
3 COSCO BUSAN with the San Francisco-Oakland Bay Bridge on November
4 7, 2007. First Amended Compl. ("FAC"), ECF No. 35, ¶ 17. As a
5 result of the allision, approximately 53,000 gallons of bunker
6 fuel spilled into the San Francisco Bay. Id. At the time of the
7 allision on November 7, 2007, Defendant John J. Cota ("Cota") was
8 piloting the cargo ship. Id. ¶ 19.

9 As explained below, the M/V COSCO BUSAN was required to have
10 a pilot on board, the Board of Pilot Commissioners ("the Pilot
11 Commission" or "the Board") licenses pilots, and a Port Agent
12 supervises the pilots. McIsaac is the current Port Agent, and
13 Nyborg is his immediate predecessor. Mot. at 2 n.3. Plaintiffs
14 allege that "McIsaac has been the Port Agent and the Chief
15 Executive of the BPA [Bar Pilot's Association] since November
16 2006," and that Nyborg was the Port Agent and Chief Executive "at
17 various times between 1998 and present." Id. ¶¶ 6-7.²

18 Plaintiffs accuse Nyborg of failing to report to the Board
19 that Cota had been convicted of driving under the influence in
20 1999. Id. ¶ 24. Plaintiffs allege Nyborg also failed to report

21
22 ¹ The term "allision" is used in maritime cases to describe an
23 accident involving a moving vessel and a stationary object or
24 vessel. Hochstetler v. Bd. of Pilot Comm'rs for the Bays of San
Francisco, San Pablo and Suisun, 6 Cal. App. 4th 1659, 1661 n.1
(Ct. App. 1992).

25 ² Moving Defendants point out that the reference to their co-
26 defendants as "The San Francisco Bar Pilot's Association" is an
27 error, and that they should be referred to as the "San Francisco
28 Bar Pilots." Reply at 1 n.1. Unless quoting from Plaintiffs'
pleadings, the Court will refer to the San Francisco Bar Pilots as
"the Bar Pilots."

1 that the U.S. Coast Guard suspended Cota's federal piloting
2 license from November 1999 to January 2000. Id.

3 Plaintiffs allege Nyborg and McIsaac knew or should have
4 known that "Defendant Cota was not medically fit to serve as a
5 marine pilot but [they] nonetheless failed to take the required
6 action to remove Cota from rotation and/or initiate procedures to
7 have Cota disqualified." Id. ¶ 25. Plaintiffs accuse McIsaac and
8 Nyborg, along with the Bar Pilots, of having "unlawfully enabled,
9 aided and abetted Cota to continue to serve as a pilot." Id. ¶¶
10 25-26.

11 Plaintiffs allege that McIsaac, in his capacity as Port
12 Agent, should have closed the bar and prevented vessel traffic on
13 the day of the allision because it was extraordinarily foggy that
14 day. Id. ¶ 27. "By law, it is the responsibility of the Port
15 Agent to close the bar . . . when prevailing conditions threatened
16 public, vessel, or pilot safety." Id. "In sum, had Defendants
17 properly discharged their statutory and common law
18 responsibilities to disqualify and/or prevent Cota from acting as
19 a pilot and to close the bar on the morning of November 7, 2007,
20 no damage to the vessel, the Bay Bridge or the environment would
21 have occurred." Id. ¶ 28.

22 Count II of Plaintiffs' FAC asserts a claim of negligence
23 against the Bar Pilots and McIsaac based on McIsaac's failure to
24 close the bar on November 7, 2007. Id. ¶¶ 111-115. Count III
25 accuses the Bar Pilots, McIsaac, and Nyborg of "negligent failure
26 to prevent Cota from piloting" by failing to disclose to the Board
27 Cota's medical condition and the DUI incident. Id. ¶¶ 116-122.

Count IV alleges that the Bar Pilots and McIsaac negligently assigned Cota to pilot the M/V COSCO BUSAN on November 7, 2007, because at that time they knew of his prior incidents and his medical condition. Id. ¶¶ 123-129. Count V alleges that the Bar Pilots and McIsaac negligently failed to maintain adequate procedures for determining and monitoring the medical competence of pilots. Id. ¶¶ 130-136. Count XI accuses the Bar Pilots, McIsaac and Nyborg of willful misconduct in that they disregarded that Cota's continued service could result in an accident. Id. ¶¶ 176-78. Plaintiffs seek money damages as indemnity or contribution from Cota, the Bar Pilots, and the Moving Defendants.

McIsaac and Nyborg move to dismiss the claims against them, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, based on the Eleventh Amendment of the United States Constitution, and they seek an award of their attorney fees under section 1198 of the California Harbors and Navigation Code. Mot. at 1.

III. LEGAL STANDARD

When a defendant submits a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing the propriety of the court's jurisdiction. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). As a court of limited jurisdiction, "[a] federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). A Rule 12(b)(1)

jurisdictional attack may be facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). In a facial attack, the defendant challenges the basis of jurisdiction as alleged in the complaint. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In such a case, the court assumes the truth of the factual allegations, and draws all reasonable inferences in the plaintiff's favor. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir. 2004).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). Allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). A motion to dismiss should be granted if the plaintiff fails to proffer "enough facts to . . . nudge[] their claims across the line from conceivable to plausible." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1974 (2007).

IV. DISCUSSION

A. Eleventh Amendment Immunity

McIsaac and Nyborg contend the Court has no jurisdiction over the claims asserted against them because they have sovereign immunity under the Eleventh Amendment of the United States

1 Constitution. Mot. at 2-3. The Eleventh Amendment provides that
2 "[t]he Judicial power of the United States shall not be construed
3 to extend to any suit in law or equity, commenced or prosecuted
4 against one of the United States by Citizens of another State, or
5 by Citizens or Subjects of any Foreign State." U.S. Const. amend.
6 XI. "The ultimate guarantee of the Eleventh Amendment is that
7 nonconsenting States may not be sued by private individuals in
8 federal court." Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S.
9 356, 363 (2001). The Eleventh Amendment "bars suits in admiralty
10 against the States, even though such suits are not, strictly
11 speaking, 'suits in law or equity.'" Welch v. Texas Dept. of
12 Highways and Public Transp., 483 U.S. 468, 473 (1987).

13 "[T]he reference to actions 'against one of the United
14 States' encompasses not only actions in which a State is actually
15 named as the defendant, but also certain actions against state
16 agents and state instrumentalities." Regents of the Univ. of Cal.
17 v. Doe, 519 U.S. 425, 429 (1997). The decision to extend
18 sovereign immunity to a public entity turns on whether the entity
19 "is to be treated as an arm of the State partaking of the State's
20 Eleventh Amendment immunity, or is instead to be treated as a
21 municipal corporation or other political subdivision to which the
22 Eleventh Amendment does not extend." Mt. Healthy City Sch. Dist.
23 Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

24 Courts in the Ninth Circuit employ a five-factor test to
25 determine whether an entity is an arm of the state:

26 [1] whether a money judgment would be satisfied
27 out of state funds, [2] whether the entity
28 performs central governmental functions, [3]

whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 250-51 (9th Cir. 1992) (quoting Mitchell v. Los Angeles Community Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988)) (hereinafter the "Mitchell test" or "Mitchell factors"). Courts "must examine these factors in light of the way California law treats the governmental agency." Belanger, 963 F.2d at 251.

B. California's Statutory Scheme

The California Legislature has enacted a statutory scheme to govern pilots for and pilotage of the San Francisco, San Pablo, and Suisun Bays ("the Bays"). Cal. Harb. & Nav. Code §§ 1100-1203. In order to ensure the safety of persons, vessels, and property using the Bays and their tributaries, and to avoid damage to these waters and their surrounding ecosystems, pilotage is mandatory for the classes of vessels that are required by statute to secure pilotage services. Id. § 1100.

1. The Board of Pilot Commissioners

The Board licenses and regulates the pilots. Id. §§ 1150, 1154, 1172. Although originally an independent state agency, the Board became a department of the Business, Transportation and Housing Agency on January 1, 2009. See Pls.' Req. for Judicial Notice ("RJN"), Docket No. 51-3, Ex. C ("Overview").³ The current

³ Plaintiffs request the Court to take judicial notice of a document that can be found on the website of the Board entitled "Pilot Commision - Overview." The Court can take judicial notice of facts not subject to reasonable dispute. Fed. R. Evid. 201(b).

1 version of the statute states: "There is in the Business,
 2 Transportation and Housing Agency a Board of Pilot Commissioners
 3 for the Bays of San Francisco, San Pablo, and Suisun, consisting
 4 of seven members appointed by the Governor, with the consent of
 5 the Senate" Cal. Harb. & Nav. Code § 1150(a).⁴

6 2. The Port Agent

7 Section 1130 of the Code sets out how a Port Agent is
 8 appointed and his or her duties:

9 A majority of all of the pilots licensed by the
 10 board shall appoint one pilot to act as port
 11 agent to carry out the orders of the board and
 12 other applicable laws, and to otherwise
 administer the affairs of the pilots. The
 appointment is subject to the confirmation of
 the board.

13 Id. § 1130(a); Cal. Code Regs. tit. 7, § 218(a). "The port agent
 14 shall be responsible for the general supervision and management of
 15 all matters related to the business and official duties of pilots
 16 licensed by the board." Cal. Harb. & Nav. Code § 1130(b); Cal.
 17 Code Regs. tit. 7, § 218(b).

18 The port agent shall immediately notify the
 19 executive director of the board of a suspected
 20 violation, navigational incident, misconduct, or
 21 other rules violation that is reported to him or
 her or to which he or she is a witness. The
 board shall adopt regulations for the manner and

22 Although the Court does not need to take judicial notice of this
 23 document in its entirety, the Court takes judicial notice of the
 24 fact that the Board became a department of the Business,
 Transportation and Housing Agency on January 1, 2009.

25 ⁴ The version of the statute that was in effect from January
 26 1, 2005 to December 21, 2008, stated: "There is in the state
 27 government a Board of Pilot Commissioners for the Bays of San
 28 Francisco, San Pablo, and Suisun, consisting of seven members
 appointed by the Governor, with the consent of the Senate"
 Id. (amended 2009).

1 content of a notice provided pursuant to this
2 section.

3 Cal. Harb. & Nav. Code § 1130(c).

4 The California Code of Regulations provides more information
5 concerning the duties of the Port Agent. The Port Agent assigns
6 pilots to vessels. Cal. Code Regs. tit. 7, § 218(c)(1). The Port
7 Agent shall:

8 (2) Prepare and administer the pilots' vacation
9 schedule.

10 (3) Represent pilots before the Board and its
11 committees.

12 (4) Collect data, prepare accounts, and make the
13 payments to the Board required of pilots by the
14 Code and these regulations

15 (5) Identify each boat used by the pilots and
16 notify the Board of the names of the pilots
17 responsible for the management of each such
18 boat.

19 (6) Report to the Board all accidents,
20 groundings, collisions or similar navigational
21 incidents involving vessels to which a pilot has
22 been assigned.

23 (7) Report to the Board any matter which, in his
24 or her opinion, affects the ability of a pilot
25 to carry out his or her lawful duties.

26 (8) Ensure that at all times adequate pilots are
27 available

28 (9) Order the Bar closed for reasons of public,
pilot, or vessel safety.

20 Id. § 218(c)(2)-(9). "In carrying out his or her duties, the Port
21 Agent shall be primarily guided by the need for safety of persons,
22 property, vessels and the marine environment." Id. § 218(d). The
23 Port Agent must also report pilot absences to the Board. Id. §
24 218(f). The Port Agent has the authority to direct pilots to
25 undergo timely drug and alcohol testing, and the Port Agent "shall
26 expeditiously inform the U.S. Coast Guard and the Board, orally
27 and in writing, of his or her determination and the basis

therefor." Id. § 218(h).

C. Plaintiffs' Allegations Concern McIsaac's and Nyborg's Actions or Omissions as Officers or Agents of the Board

Under the Eleventh Amendment, "a state official is immune from suit in federal court for actions taken in an official capacity." California v. Deep Sea Research, Inc., 523 U.S. 491, 502 (1998). Moving Defendants contend that they are state officials immune from suit. Mot. at 3. Plaintiffs respond that there are fundamental factual questions concerning the relationship of the Moving Defendants to the Bar Pilots and the Board that cannot be resolved until after the parties have an opportunity to engage in discovery. Opp'n at 2-3. Plaintiffs focus on the Moving Defendants' role as Bar Pilots or Chief Executives of the Bar Pilots. Id. at 6. Plaintiffs suggest Port Agents function as "liaisons" between the Bar Pilots and the Board. Id. at 6. Plaintiffs contend that McIsaac and Nyborg were Port Agents of the Bar Pilots, not Port Agents of the Board. Id. at 7 n.5.

The relevant statutes and regulations do not support Plaintiffs' contentions. Title 7, Division 2 of California's Code of Regulations deals with the Board, and the definition and duties of the Port Agent are contained within, and explained within, this division. See Cal. Code Regs. tit. 7, §§ 202, 218. As the regulations creating the office of Port Agent are found within this division, the Court finds that Port Agent is an agent or officer of the Board.

However, it is also clear that the Port Agent sometimes acts

1 on behalf of the Bar Pilots, and sometimes on behalf of the Board.
2 Although confirmed by the Board, the Port Agent is selected by a
3 majority of the pilots. Id. § 218(a). The Port Agent
4 "[r]epresents pilots before the Board and its committees." Id. §
5 218(3). When doing so, the Port Agent is acting on behalf of the
6 pilots. See Overview at 5 ("the Port Agent . . . is selected by
7 the pilots to represent them at the Board."). It is not
8 inaccurate, therefore, for Plaintiffs to describe the Port Agent
9 as a liaison between the Bar Pilots and the Board.

10 However, Plaintiffs' allegations against McIsaac and Nyborg
11 focus on conduct performed on behalf of the Board, not on behalf
12 of the Bar Pilots. Plaintiffs allege that McIsaac should not have
13 assigned Cota to pilot the M/V COSCO BUSAN, that Nyborg failed to
14 report information concerning Cota, that McIsaac and Nyborg knew
15 Cota was medically unfit to serve as a pilot but failed to report
16 him, and that McIsaac should have closed the bar on November 7,
17 2007. FAC ¶¶ 23-28. These allegations correspond precisely to
18 the Port Agent's regulatory duties. See Cal. Code Regs. tit. 7, §
19 218(c) ("The Port Agent shall [a]ssign Pilots to Vessels .
20 . . . [r]eport to the Board any matter which, in his or her
21 opinion, affects the ability of a pilot to carry out his or her
22 lawful duties . . . [and] [o]rder the Bar closed for reasons of
23 public, pilot, or vessel safety."). Plaintiffs' FAC explicitly
24 states that "[a]t all times alleged herein, Defendants McIsaac and
25 Nyborg were acting within the course and scope of their capacities
26 as Port Agents, as defined by Title 7, California Code of
27 Regulations section 218, and therefore were acting as agents of
28

1 the California Board of Pilot Commissioners." FAC ¶ 11.
2 Plaintiffs essentially argue that McIsaac and Nyborg were
3 negligent in their supervision of Cota, and in this supervisory
4 role, McIsaac and Nyborg were acting on behalf of the Board.
5 There is no need for discovery regarding this issue. The Court
6 finds, as a matter of law, that McIsaac and Nyborg were acting as
7 officers or agents of the Board when they engaged in the conduct
8 complained of in Plaintiffs' FAC.

9 Furthermore, Regal Stone has argued in a related case that
10 McIsaac and Nyborg were acting on behalf of the Board when engaged
11 in the acts or omissions complained of here. In State of
12 California v. Regal Stone et al., Case No. 08-2268, Regal Stone
13 filed a Counterclaim alleging that the Port Agent "is a dual
14 agent, who acts on behalf of the pilots and the Board, depending
15 on the circumstances," alleging that the Port Agent was negligent
16 in carrying out its duties by failing to report matters to the
17 Board and by failing to close the bar, and alleging that the Board
18 "is liable for the negligence of the Port Agent when he acts on
19 behalf of the Board." See Defs.' RJN, ECF No. 53, Ex. 1 ("Regal
20 Stone Countercl.") ¶¶ 26, 68-71.⁵ Regal Stone is one of the
21 Plaintiffs in this case. Regal Stone's own allegations in this
22 related case confirms the Court's determination that McIsaac and
23 Nyborg were acting as officers or agents of the Board when they

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25 ⁵ The Court can take judicial notice of Regal Stone's
26 allegations in State of California v. Regal Stone et al., Case No.
27 08-2268, a related case that is also before this Court. It is not
28 subject to reasonable dispute that Regal Stone made these
allegations.

1 assigned Cota to pilot the M/V COSCO BUSAN, when they failed to
2 report information concerning Cota's past conduct and medical
3 condition, and when McIsaac failed to close the bar on November 7,
4 2007.

5 **D. The Board is Immune from Suit**

6 Having determined that McIsaac and Nyborg were acting on
7 behalf of the Board, the next question is whether the Board can be
8 considered an arm of the state immune from suit in federal court.
9 Plaintiffs do not dispute that the Board is an agency of the
10 state. Opp'n at 7. Instead, they contend the Board is not a
11 state agency immune from suit under the Eleventh Amendment. Id.
12 The Court disagrees with Plaintiffs. The Mitchell test
13 establishes that the Board is immune from suit.

14 **1. Money Judgment Satisfied out of State Funds**

15 The first prong of the Mitchell test -- whether a money
16 judgment against the agency would be satisfied out of State funds
17 -- is the "predominant factor." Belanger, 963 F.2d at 251.
18 Plaintiffs contend that a money judgment against the Board would
19 not be satisfied out of state funds because the Pilot Commission
20 Overview states that the Board's expenses "are paid for by
21 industry surcharges on pilotage fees and not by state or local
22 taxes." Overview at 1.

23 However, the relevant statute provides that:

24 All moneys received by the board pursuant to
25 the provisions of any law shall be accounted
26 for at the close of each month to the
27 Controller in the form that the Controller may
28 prescribe and, at the same time on the order
of the Controller, all these moneys shall be
paid into the State Treasury to the credit of

the Board of Pilot Commissioners' Special Fund.

Cal. Harb. & Nav. Code § 1159(a). The State Controller appropriates money from this fund in the State Treasury for the payment of the compensation and expenses of the Board and its officers and employees. Id. § 1159(b). These statutes imply that any judgment against the Board would be paid from state funds. See Cal. Gov't Code § 900.6 ("'State' means . . . any . . . board, commission or agency of the State claims against which are paid by warrants drawn by the Controller."), § 965.2(a) ("The Controller shall draw a warrant for the payment of any final judgment . . . against the state").

The mere fact that a state agency collects fees does not bar it from Eleventh Amendment immunity. See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 431 (1997) (treating state university as arm of the state immune from suit even though university collects fees); Lupert v. California State Bar, 761 F.2d 1325, 1327 (9th Cir. 1985) (treating Board of Governors and Committee of Bar Examiners of the State Bar of California as immune from suit even though State Bar collects fees). The first, and predominant, Mitchell test factor weighs in favor of finding the Board immune from suit.

2. Central Governmental Functions

Plaintiffs contend the Board does not perform central governmental functions because it provides service for one isolated geographic area of the State, and because at the time of the incident, "it was not part of any governmental department."

1 Opp'n at 9. While it is true that the Board became a department
2 of the Business, Transportation and Housing Agency on January 1,
3 2009, see Cal. Harb. & Nav. Code § 1150(a), it does not follow
4 that the Board was not performing central governmental functions
5 before that date. The Board "was created by [the] first
6 legislative session of the new state of California in 1850 and has
7 been serving continuously ever since." Overview at 1. While the
8 Board's area of coverage does not extend to the whole state, it is
9 the only state pilot commission in California. Id. at 2. Pilots
10 outside the Board's area of coverage operate under the authority
11 of their federal pilot's license. Id. at 2.

12 California's statutory scheme shows that the Board performs
13 central governmental functions. The California Legislature "finds
14 and declares that it is the policy of the state to ensure the
15 safety of persons, vessels, and property using Monterey Bay and
16 the Bays of San Francisco, San Pablo, and Suisun, and the
17 tributaries thereof . . . by providing competent, efficient, and
18 regulated pilotage for vessels required by this division to secure
19 pilotage services." Cal. Harb. & Nav. Code § 1100. The
20 Legislature further finds that "[a] program of pilot regulation
21 and licensing is necessary in order to ascertain and guarantee the
22 qualifications, fitness, and reliability of qualified personnel
23 who can provide safe pilotage of vessels entering and using
24 Monterey Bay and the Bays of San Francisco, San Pablo, and
25 Suisun." Id. § 1101(e). "Bar pilotage in the Bays of San
26 Francisco, San Pablo, and Suisun has continuously been regulated
27 by a single-purpose state board since 1850, and that regulation
28

1 and licensing should be continued." Id. § 1101(g). Regulating
2 and licensing the Bar Pilots to ensure the safety of person,
3 vessels, and property are central governmental functions. The
4 second Mitchell test factor weighs in favor of finding the Board
5 immune from suit.

6 3. Other Mitchell Test Factors

7 Plaintiffs correctly point out that the Board can sue and be
8 sued. See, e.g., Hochstetler, 6 Cal. App. 4th at 1663 (pilot
9 filed petition for writ of mandate in state court seeking to
10 overturn Board's suspension of his state pilot license). However,
11 the Ninth Circuit has found state agencies immune from suit even
12 though they could sue or be sued. In Belanger, the Ninth Circuit
13 noted that the third Mitchell factor "is entitled to less weight
14 than the first two factors," and found California school districts
15 immune even though they can sue or be sued. 963 F.2d at 254.

16 With regard to the final two factors, Plaintiffs do not
17 contend that the Board can own property in its own name, see Opp'n
18 at 9, and Moving Defendants point out that the Board does not have
19 independent corporate status. Reply at 11. Only the third factor
20 weighs against a finding of immunity, and therefore the Court
21 finds that the Board is a state agency immune from suit under the
22 Eleventh Amendment. As Plaintiffs' FAC focuses on the Moving
23 Defendants' conduct when acting on behalf of the Board, the Court
24 concludes that the Moving Defendants are immune from suit under
25 the Eleventh Amendment and should be dismissed from this case.

26 E. Attorney Fees

27 Moving Defendants request that they be awarded fees and
28

1 costs. Mot. at 6. Moving Defendants rely on Section
2 1198(c)(1)(D) of the Harbors and Navigation Code, which provides
3 that "[a] pilot who is the prevailing party shall be awarded
4 attorney's fees and costs incurred in any action to enforce a
5 right to indemnification provided pursuant to this subdivision."
6 Cal Harb. & Nav. Code § 1198(c)(1)(D).

7 Here, the Court has dismissed the Moving Defendants because
8 the allegations against them focus upon actions that they took, or
9 failed to take, as agents or officers of the Board. See Part
10 IV.C, supra. While pilots can enforce a right to indemnification
11 pursuant to Section 1198(c), there is nothing in the statutory
12 language to indicate that Port Agents can do so when acting on
13 behalf of the Board. Accordingly, the Court DENIES the Moving
14 Defendants' Section 1198 request for attorney fees.

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V. CONCLUSION

For the foregoing reasons, the Court GRANTS the Motion to Dismiss filed by Defendants Captain Peter McIsaac and Captain Russell Nyborg, who are hereby DISMISSED from this case WITH PREJUDICE. The Court DENIES their request for attorney fees.

IT IS SO ORDERED.

Dated: September 7, 2010

Samuel L. Smith
UNITED STATES DISTRICT JUDGE